Malaysian Reinsurance Bhd v Syarikat Weifong Industries Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–650–03 OF 2012
MOHD HISHAMUDIN, AZIAH ALI AND LIM YEE LAN JJCA
16 APRIL 2014

Contract — Guarantee — Bank guarantee — Wrongful and unconscionable call by beneficiary on unconditional on demand bank guarantee — Call made despite party which took out guarantee informing beneficiary call was wrongful — Failure of beneficiary before making call to enquire into objections made by party which took out guarantee — Whether party which took out bank guarantee entitled to rely on ground of unconscionability to recover monies paid to beneficiary under guarantee — Whether in law beneficiary under unconditional on demand bank guarantee not absolutely entitled to monies under guarantee

The respondent entered into an agreement ('the supply agreement') to buy 320 metric tons of latex from a company ('the supplier') at a pre-arranged price. The delivery date(s) for the latex was to be mutually agreed upon by the parties. The supply agreement was silent on the point. In accordance with the supply agreement, the respondent caused a bank guarantee ('the BG') for RM970,000 to be issued in favour of the supplier's nominee, the appellant. The BG was valid from 1 February 2005 to 30 June 2005. During that period, the respondent ordered, received and paid for latex delivered to it by the supplier. However, on 30 June 2005, the supplier via fax alleged that the respondent had breached the supply agreement by failing to buy the balance of latex from it on or before that date. Despite the respondent's immediate response that it was ready to accept delivery of the balance of the latex that same day, the supplier failed to deliver the same. Instead, the supplier notified the appellant of the respondent's 'breach' and advised it to call upon the BG, which the appellant did, despite protests from the respondent both to the supplier and to the appellant that it had not breached the supply agreement, that it had paid for all latex it had received and that the call upon the BG was baseless. The appellant was paid the full sum under the BG. The respondent filed an action in the High Court to declare that the supplier had breached the supply agreement and sought an order that the appellant refund to it the BG sum of RM970,000 with interest thereon till date of full settlement. The instant appeal was against the decision of the High Court allowing the respondent's claim. At the appeal hearing the appellant contended that the respondent's claim should have been dismissed as the BG, being an unconditional on demand guarantee, was payable without the appellant having to prove that the supply agreement had been breached and notwithstanding any protest by the respondent, the

supplier or any third party. The respondent, on the other hand, submitted that the call on the BG was wrongful and unconscionable and that it was entitled, as the innocent party, to recover the money that had been paid to the appellant under the BG.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The court agreed with the respondent's contention that, in law, an unconditional on demand bank guarantee did not give the beneficiary an absolute entitlement to the money under the guarantee. An unconditional bank guarantee simply provided a trouble-free mechanism to secure payment (see para 30).

(2) On the facts in the present case, the respondent was entitled to rely on the ground of unconscionability to recover the sum paid to the appellant under the bank guarantee. There was no basis at all for the call on the guarantee. The appellant was aware that the purpose of the guarantee was to secure the respondent's obligations and payments under the supply agreement. The respondent had not breached the agreement and the only 'basis' on which the appellant called on the guarantee was an unsubstantiated claim that the supply agreement had been assigned to it and an unfounded allegation that the respondent had defaulted in the payment of RM970,000. The appellant was aware of the respondent's objection to the calling upon the guarantee and the reason for the objection but instead of making a proper inquiry into the objection it chose to ignore the respondent's pleas (see paras 33, 35–38).

[Bahasa Malaysia summary

Responden memasuki perjanjian ('perjanjian pembekalan') untuk membeli 320 tan metrik lateks daripada syarikat ('pembekal') untuk harga pra atur. Tarikh (tarikh-tarikh) penghantaran untuk lateks yang dipersetujui bersama oleh pihak-pihak. Perjanjian pembekalan adalah senyap atas poin tersebut. Mengikut perjanjian pembekalan, responden menyebabkan jaminan bank ('JB') untuk RM970,000 dikeluarkan memihak calon pembekal, perayu. JB tersebut sah dari 1 Februari 2005 hingga 30 Jun 2005. Semasa tempoh tersebut, responden memesan, menerima dan membayar untuk lateks yang dihantar kepadanya oleh pembekal. Walau bagaimanapun, pada 30 Jun 2005, pembekal melalui faks mendakwa bahawa responden telah melanggar perjanjian pembekalan kerana gagal unruk membeli baki lateks daripadanya pada tahun sebelum tarikh tersebut. Meskipun responden menjawab dengan segera yang ia bersedia untuk menerima penghantaran baki lateks pada hari yang sama, pembekal gagal untuk menghantarnya. Sebaliknya, pembekal memberitahu perayu mengenai 'breach' responden dan menasihatnya untuk membangkitkan JB, yang mana dibuat oleh perayu, meskipun terdapat bantahan daripada responden kepada kedua-dua pembekal dan perayu yang ia tidak melanggar perjanjian pembekalan tersebut, yang ia membayar untuk

kesemua lateks yang diterimanya dan untuk membangkitkan JB adalah tidak berasas. Perayu dibayar jumlah penuh di bawah JB tersebut. Responden memfailkan tindakan di Mahkamah Tinggi untuk mengisytiharkan bahawa pembekal telah memungkiri perjanjian pembekalan dan memohon perintah bahawa perayu membayar balik kepadanya jumlah JB sebanyak RM970,000 dengan faedah ke atasnya sehingga tarikh penyelesaian penuh. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi membenarkan tuntutan responden. Pada pendengaran rayuan perayu berhujah bahawa tuntutan responden patut ditolak memandangkan JB tersebut, sebagai jaminan atas permintaan tidak bersyarat, boleh dibayar tanpa perayu membuktikan bahawa perjanjian pembekalan telah dimungkiri dan walaupun terdapat apa-apa bantahan oleh responden, pembekal dan mana-mana pihak ketiga. Responden sebaliknya, berhujah bahawa pembangkitan JB adalah salah dan tak berpatutan dan bahawa ia berhak, sebagai pihak yang tidak bersalah untuk mendapatkan semula wang yang telah dibayar kepada perayu di bawah JB tersebut.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Mahkamah bersetuju dengan hujahan responden bahawa dari segi undang-undang, jaminan atas permintaan tidak bersyarat tidak memberikan benefisiari hak mutlak kepada wang di bawah jaminan. Jaminan atas permintaan tidak bersyarat hanya memperuntukkan mekanisma bebas masalah untuk menjamin bayaran (lihat perenggan 30).

(2) Atas fakta kes ini, responden berhak untuk bergantung atas alasan adalah berpatutan untuk mendapatkan semula jumlah yang dibayar kepada perayu di bawah jaminan bank. Tidak terdapat asas langsung untuk membangkitkan jaminan tersebut. Perayu sedar bahawa tujuan jaminan adalah untuk menjamin tanggungjawab responden dan bayaran-bayaran di bawah perjanjian pembekalan. Responden tidak memungkiri perjanjian tersebut dan satu-satu 'basis' di mana perayu membangkitkan jaminan adalah tuntutan tidak berasas bahawa perjanjian pembekalan yang telah diserah hak kepadanya dan dakwaan tak berasas bahawa responden telah memungkiri bayaran sebanyak RM970,000. Perayu sedar mengenai bantahan responden untuk membangkitkan jaminan tersebut dan alasan untuk bantahan sepatutnya membuat siasatan betul ke dalam bantahan tetapi sebaliknya ia memilih pli responden (lihat perenggan 33, 35–38).]

Notes

For a case on bank guarantee, see 3(3) *Mallal's Digest* (14th Ed, 2013 Reissue) para 4862.

Cases referred to

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149, SC (refd)

Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor [2009] MLJU 1688; [2009] 1 LNS 913, HC (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)

Appeal from: Civil Suit No D5–22–951 of 2005 (High Court, Kuala Lumpur)

DP Naban (Mohan Krishnan with him) (Kumar Partnership) for the appellant.
Gideon Tan (N Sivaraj with him) (Gideon Tan Razali Zaini) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned judge of the High Court of Kuala Lumpur given on 2 March 2012.

[2] The learned High Court judge, after a full trial, had allowed the respondent's claim for the following reliefs:

(a) a declaration that the first defendant had breached an agreement ('the supply agreement') dated 13 January 2005 entered into between the first defendant and the respondent; and

(b) an order against the appellant (the second defendant at the High Court) directing the appellant to restore to the respondent (the plaintiff at the High Court) a sum of RM970,000 that had been paid to the appellant by the third defendant purportedly pursuant to a call under a bank guarantee, namely, bank guarantee No 031BGA 0531009 ('the bank guarantee') with interest at the rate of 4% pa from the date of the receipt of the said amount under the bank guarantee until the date of full settlement.

[3] The first defendant (KL Trading & Agency House Sdn Bhd) did not participate in the trial; nor is the first defendant a party to this appeal.

[4] Thus the second defendant (Malaysian Reinsurance Bhd) is the only appellant in this appeal.

[5] On 11 March 2014, we unanimously dismissed the appeal.

[6] We now give our grounds of judgment.

[7] The respondent (Sykt Weifong Industries Sdn Bhd) is in the business of manufacturing mattresses and pillows under the brand name 'Getha'. The respondent entered into the supply agreement with the first defendant on 13 January 2005. It is a term of the supply agreement that the first defendant is to supply 320 metric tons of latex; and the respondent is to purchase the same at the purchase price of RM5.05 per kg, totalling to RM969,600. The supply agreement is silent as to the exact dates of delivery.

[8] It is also one of the terms and conditions' of the supply agreement that the respondent would furnish the first defendant a bank guarantee to secure the performance of, and payments under, the agreement by the respondent.

[9] The supply agreement was carried out based on previous course of dealings and mutual understandings between the first defendant and the respondent; and these, among others, would entail the respondent issuing a bank guarantee in favour of the appellant, as nominated by the first defendant to be the beneficiary under the bank guarantee. Accordingly, the respondent caused Alliance Bank Malaysia Bhd (the third defendant at the High Court) to issue a bank guarantee No 031 BGA 0531009 for a sum of RM970,000 favouring the appellant (the beneficiary under the bank guarantee) which was valid from 1 February 2005 to 30 June 2005.

[10] The respondent would also arrange for the delivery date of the latex, a suitable date agreed to by both parties.

[11] The bank guarantee, as issued by Alliance Bank Malaysia Bhd, is in the following form:

ALLIANCE BANK

We hereby issue our BG as per text below which pis advise the Beneficiary accordingly

MALAYSIAN NATIONAL REINSURANCE BHD

12th Floor, Bangunan Malaysian Re

No. 17, Lorong Dungun, Damansara Heights

50490 Kuala Lumpur

Dear Sir,

BANK GUARANTEE NO. 031BGAO531009 FOR RM970,000.00

WHEREAS

(A) KL Trading & Agency House Sdn Bhd ('KLTAH') has entered into an invoice/agreement ('Invoice/Agreement') with Syarikat Weifong

Industries Sdn Bhd ('Buyer') for the supply of goods and services by KLTAH to Buyer dated 13 January 2005. A

(B) It is a term of the Invoice/Agreement that the Buyer obtains a bank guarantee in favour of KLTAH or its beneficiaries to secure its obligations and payments under the Invoice/Agreement. B

(C) KLTAH has requested that Buyer obtains a bank guarantee in favour of you, Malaysian National Reinsurance Berhad ('Malaysian Re') as its Beneficiary.

At the request of KLTAH and in consideration of KLTAH (hereinafter called 'The Supplier') agreeing to supply GOODS AND SERVICES (hereinafter called 'The Supply') to Syarikat Weifong Industries Sdn Bhd of Lot 60, Batu 11, Jalan Cheras, 43000 Kajang, Selangor Darul Ehsan (hereinafter called 'the Client'), and upon the request of KLTAH that this Guarantee be issued to you. Malaysian Re, as its Beneficiary, we Alliance Bank Malaysia Berhad of No. 150-152, Jalan Cerdas, Taman Connaught, Cheras, 56000 Kuala Lumpur (hereinafter called the 'Guarantor') hereby irrevocably and unconditionally agree to guarantee payment, upon receipt of your demand in writing without proof or condition, of a total sum not exceeding in aggregate Ringgit Malaysia: Nine Hundred Seventy Thousand Only (RM970,000.00) (hereinafter called 'the Amount'). C D

The irrevocable Guarantee is continuing and valid from 1 February 2005 to 30 June 2005 ('the Validity Period') and shall be binding notwithstanding any changes, amalgamation and reconstruction or otherwise of the Guarantor, Supplier, Client or Beneficiary. E

All demands from the Beneficiary for any payment under this Guarantee shall be in writing ('said written notice') and must be received by the Guarantor within twenty-one (21) days after expiry of the Validity Period (the 'Expiry Period'). F

It is expressly agreed and understood that upon Guarantor's receipt of the said written notice from the Beneficiary, without proof or condition, the Guarantor shall make payment under this Guarantee to the Beneficiary within five (5) business days notwithstanding any protest by the Supplier, Client and/or any third party. G

If at the end of the Expiry Period, we have not received any demand from the Beneficiary, this said Guarantee shall lapse and cease to have effect whatsoever and we shall be deemed to be discharged and released from all and any liability under this said Guarantee, regardless of whether or not the original Bank Guarantee is returned to us for cancellation. H

All payments made by us shall be made in full without set-off, counterclaim and free and clear of and without deduction of or withholding for or on account of any tax of any nature now or subsequently imposed by any country or any subdivision or taxing authority of or in such country or any federation or organisation of which such country is a member. I

This Irrevocable Guarantee shall be governed by and construed in accordance with the laws of Malaysia and we hereby agree to submit to the exclusive jurisdiction of the courts in Malaysia over any claims arising out of this Irrevocable Guarantee.

Kindly collect all your charges if any from beneficiary.

[12] From 22 March 2005 to 22 June 2005, the respondent ordered latex and received them. The respondent also paid the first defendant a total sum of RM652,792.25.

[13] What happened was that, out of the blue, the first defendant issued a fax dated 30 June 2005 stating, unilaterally, that the last date for delivery is 30 June 2005; and alleged that the respondent had breached the Supply Agreement by failing to purchase from the first defendant the balance latex on or before 30 June 2005.

[14] The respondent promptly responded to the first defendant's fax informing that they were ready and willing to accept delivery of the remaining latex and instructed the first defendant to make the necessary arrangements for the delivery on 30 June 2005. However, the first defendant failed to respond to the respondent's fax letter and failed to deliver the latex. As a result the respondent had to purchase the latex from a third party, namely, Golden Hope Plantations, at a higher price of RM5.80 per kg.

[15] Now, what had also happened on the same date (that is, 30 June 2005) was that the first defendant issued a fax letter to the appellant notifying the latter that the respondent had 'breached' the supply agreement. In the same fax letter, the first defendant advised the appellant to call upon the bank guarantee by reason of the alleged breach. This fax letter reads:

30th June 2005

Malaysian Reinsurance Berhad

No. 17, Lorong Dungun, Damansara Heights

Kuala Lumpur

Attn : Ms Sue Wong/Mona Mazleen Mokhtar

Dear Madam

Bank Guarantee No. 031 BGA 0531009 for RM970,000.00

Please be advised that our customer, Weifong Industries Sdn Bhd has failed its obligations to fulfil our agreement number KLT/S-0577/130105.

As such, we wish to inform that we hold them liable of the breach in contract and advised that the above BG be called upon as repayment for our Promissory Note No. KLT/S-0577/130105/001.

Should you need further clarification or have further queries, I would be glad to answer them for you.

Yours sincerely,

Sign

Leong Joo Yee

Financial Controller

[16] Now, on the part of the appellant, they, upon receipt from the first defendant of the above mentioned fax of 30 June 2005, promptly issued a notice of demand dated 1 July 2005 to the third defendant (Alliance Bank Malaysia Bhd). This notice of demand states that the respondent had defaulted on its payment to the appellant in the sum of RM970,000 due to the appellant on 30 June 2005; and that the appellant was calling on the bank guarantee for the payment of the said sum of RM970,000. This notice of demand reads:

Alliance Bank Malaysia Berhad

Kuala Lumpur

Re: Notice of Demand on Bank Guarantee No. 031 BGA 0531009 for RM 970,000.00

Please be advised that your above mentioned client, Weifong Industries Sdn Bhd of Lot 60, Batu 11 Jalan Cheras, 43000 Kajang,Selangor Darul Ehsan had defaulted in its payment of RM970,000.00 due to us on 30 June 2005.

As the beneficiary to the Bank Guarantee, we hereby call on your payment of RM970,000.00 to be credited to our account with Bumiputra Commerce BankBerhad...

Sign

Sue Wong General

Manager

[17] A copy of this fax was extended to the respondent.

[18] The respondent promptly objected to the calling of the bank guarantee on the grounds that they had made full payment for the latex delivered by the first defendant, and that they had not breached the supply agreement and therefore, the calling of the bank guarantee was without any basis. The respondent's plea to the first defendant and the appellant not to call on the bank guarantee, however, fell on deaf ear.

[19] This prompted the respondent to file the present action against the first defendant, the appellant (as the second defendant) and Alliance Bank Malaysia Bhd (as the third defendant), seeking, among others, for an injunction to restrain the appellant from receiving the said sum of RM970,000 from Alliance Bank Malaysia Bhd. It is perhaps pertinent at this juncture to point out that at the High Court, the learned High Court judge made a finding that it was the

first defendant who had breached the supply agreement, and not the respondent.

[20] Now, the appellant's case is as follows. They had granted the first defendant a revolving credit facility of up to RM20m. The first defendant was allowed to draw down the facility upon the following conditions being satisfied:

(a) the first defendant was to provide evidence of a contract between itself and a purchaser;

(b) the first defendant was to execute a promissory note for the sum to be drawn down against the value of the contract;

(c) the first defendant was to arrange for the contract to be assigned to the appellant with notice to the purchaser;

(d) the first defendant was to secure a bank guarantee to ensure the purchaser's payment under the contract between the first defendant and the purchaser; and

(e) the nominated beneficiary under the bank guarantee was to be the appellant.

[21] Before the High Court the appellant raised, among others, the following arguments. Firstly, the respondent had failed to make the payment to the appellant for the latex delivered by the first defendant pursuant to the (alleged) assignment of the supply agreement in favour of the appellant.

[22] The respondent, on their part, denied that there was any assignment of the supply agreement.

[23] Secondly, it was argued by the appellant under the supply agreement that, in any case, the bank guarantee being an unconditional bank guarantee, the appellant had an absolute right to call upon the bank guarantee, without proving any breach of the supply agreement or any non-payment under the alleged assignment.

[24] Both arguments were rejected by the learned High Court judge.

[25] On the issue of assignment, the learned High Court judge, having considered the evidence of handwriting experts, made a finding of fact that the appellant had failed to prove the assignment of the supply agreement to the appellant.

[26] In this appeal, Dato' Naban, learned counsel for the appellant is not

pursing the assignment argument. In other words, Dato' Naban now accepts that there was no assignment. He is only pursuing the following argument (which I shall quote from the appellant's written submission):

> The Appellant contended that the Bank Guarantee being an on demand guarantee payable without proof or condition and notwithstanding any protest by the Respondent, KLTA and any third party, the Respondent's claim against it should be dismissed with costs.

[27] Reliance is placed by Dato' Naban on the judgment of Peh Swee Chin FCJ in the Federal Court case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 wherein the learned judge said (at pp 156–157):

> We endorse fully, however, the view of an eminent local academic that the said description could have served to cloud the real issue, which is one of contractual interpretation of a performance bond and not of the nature of the transaction — 'Calls on Performance Bonds in Malaysia — the Current Law' by Prof Vincent Powell-Smith [1992] 2 MLJ i.
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> That the real issue of a performance bond is one of contractual interpretation was the unanimous view of three judges in the Court of Appeal in *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* (1990) 2 Lloyd's Rep 496; (1991) 51 BLR 1. It is not our intention to write an essay on performance bonds, in the instant appeal, except to repeat that it 'involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties' — per Sir Denys Buckley in *IE Contractors* (1990) 2 Lloyd's Rep 496at p 503;; [1991] 51 BLR 1 at p 15.
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> Looking at the performance bond (bank guarantee No 065–92–106) as set out above, it was stated to be an 'unconditional' guarantee. The only other thing of note would be the stated requirement that all claims must be made in writing. This performance bond was, on a true construction, a pure on demand guarantee, and all that was required to trigger it was a demand in writing. It would not be dependent or conditional on the production of a document, eg a certificate from some nominated independent person like an architect as in some building contracts, etc Neither was it worded to make it conditional for Bank Bumiputra, the issuer of the performance bond, to inquire into the existence or otherwise of any breach of any contractual obligation between the beneficiary of the bond, ie the buyer in this case, and the seller; at the behest of the latter itself, the performance bond was issued. It was not even worded to make it conditional on a simple declaration by the beneficiary, without proof to its issuer, that the seller had not paid damages to the buyer after the release by the buyer of the sum of RM466,562.

[28] Mr Gideon Tan, learned counsel for the respondent, on the other hand, submits that the respondent's pleaded case is a wrongful call on the bank guarantee by the appellant.

[29] Mr Gideon Tan submits that the respondent, being the innocent party,

is entitled to recover the money that had been wrongly paid out under the bank guarantee to the appellant, and that the conduct of the appellant in calling on the bank guarantee was unconscionable.

[30] With respect, we agree with Mr Gideon Tan's contention that in law an unconditional on demand bank guarantee does not give the beneficiary an absolute entitlement to the money under the bank guarantee. An unconditional bank guarantee simply provides a trouble fee mechanism to secure payment.

[31] Mr Gideon Tan refers to the principle of unconscionable conduct as now recently accepted by the recent Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; where Abdul Hamid Embong FCJ (approving the judgment of Mohamad Ariff Yusof JC (as he then was) in *Focal Asia Sdn Bhd & Anor v Raja Noraini binti Raja Datuk Nong Chik & Anor* [2009] MLJU 1688; [2009] 1 LNS 913) said as follows (at pp 15 & 17):

> [33] It would seem from the modern authorities we have read, that in the case of on demand letters of guarantee of performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionability as a separate and independent ground to allow for a restraining order on the beneficiary.
>
> [34] The rationale for embracing this equitable exception can be seen from this passage of the Australian High Court decision of *Stern v McArthur* (1988) 165 CLR 489, where it was said:
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> > The general underlying notion is that which has long been identified as underlying much of equity's traditional jurisdiction to grant relief against unconscientious conduct, namely, that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself ...
> >
> > ...
> >
> > [42] So, to answer the question posed to us, we say yes, unconscionability may now be raised as a distinct ground, to restrain a beneficiary under a bank guarantee or performance bond.

[32] As for the judgment of Peh Swee Chin FCJ in *Esso Petroleum*, the Federal Court in *Sumatec Engineering* noted (at para 31 of the judgment) that the unconscionable conduct argument was not advanced in *Esso Petroleum* and as such the Federal Court in *Esso Petroleum* did not consider that issue.

[33] In our judgment, in the present case, on the facts, the respondent is entitled to rely on the ground of unconscionability to recover from the appellant the sum paid to the appellant under the bank guarantee.

[34] We so hold for the following reasons.

[35] Firstly, the appellant was aware of the purpose of the bank guarantee: that is, to secure the respondent's obligations and payments under the supply agreement.

[36] Secondly, the respondent had not breached the supply agreement. On the contrary, as ruled by the learned High Court judge, it was the first defendant who had breached the supply agreement. In other words, there was no basis at all for the call on the bank guarantee.

[37] Thirdly, the only 'basis' on which the appellant called on the bank guarantee is on an unsubstantiated claim of the existence of an assignment, and on an unfounded allegation that the respondent had defaulted in the payment of RM970,000.

[38] Fourthly, the appellant was aware of the respondent's objection to the calling of the bank guarantee and the reason for the objection. Instead of making a proper inquiry into the objection, it chose to ignore the respondent's plea.

[39] In conclusion, we uphold the decision of the learned High Court judge.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar